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Nos. 01-1118, 01-1119

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ET AL.,
Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

OPERATION RESCUE,
Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,
Respondents.

On Petitions for Writs of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE STATE OF ALABAMA, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

This brief for *amicus curiae* will address the following two questions presented in the petition for a writ of certiorari in No. 01-1119:

1. Whether the Seventh Circuit erred in ruling, in conflict with the Ninth Circuit, that private civil litigants may obtain injunctive relief under the federal Racketeer Influenced and Corrupt Organizations (RICO) statute?

2. Whether the "obtaining of property" element of the federal extortion statute, which is a predicate offense for civil RICO, may be satisfied, as the Seventh Circuit held, merely by a showing of "interference with the rights" of another?

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BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

The State of Alabama respectfully submits this brief as *amicus curiae* pursuant to Supreme Court Rule 37.4. The State of Alabama submits this brief in support of the petitions for writs of certiorari to the United States Court of Appeals for the Seventh Circuit.

INTEREST OF *AMICUS CURIAE*

State governments have a profound interest in protecting the First Amendment rights of their citizens. State officials are also named as defendants in innumerable lawsuits alleging State interference with various constitutional or statutory rights. In the context of this case, then, *amicus curiae* has a dual interest in seeing that its citizens' constitutionally protected interest in conducting legitimate, peaceful protests is not chilled by an unwarranted threat of civil RICO litigation and seeing that its State officials do not face an unwarranted threat of civil RICO litigation arising from an overly expansive interpretation of the scope and purpose of that statute and the Hobbs Act.

SUMMARY OF ARGUMENT

Last term, in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), this Court explained its "particular understanding of the genesis of private causes of action." *Id.* at 286. The decision below, which found an implied private cause of action for injunctive relief in the civil RICO statute, 18 U.S.C. § 1964 (2000), is inconsistent with this Court's holding in *Sandoval*. The text of the civil RICO statute manifests a congressional intent to authorize the Attorney General to seek injunctive relief under RICO, but to authorize private persons to seek only treble damages, costs, and attorney's fees. Nowhere does the statute authorize private entities to seek injunctive relief under RICO, and Congress has repeatedly refused to amend the civil RICO statute to create such a private cause of action for injunctive relief. Unfortunately, the creation of a private cause of action for injunctive relief under civil RICO further chills legitimate activity protected by the First Amendment.

The expansion of the definition of "extortion" under the Hobbs Act, 18 U.S.C. § 1951 (2000), by the Seventh Circuit to prohibit conduct that does not involve "the obtaining of property" raises the specter of unwarranted civil RICO litigation against State officials. By unmooring the definition of property under the Hobbs Act from the "obtaining" element of the offense, the Seventh Circuit substantially broadened the Hobbs Act, and thus civil RICO. This interpretation could subject almost any State regulation of economic activity or property to civil RICO litigation. It also expands civil RICO to chill activity protected by the First Amendment in which protesters or demonstrators do not obtain property of any kind. Such untoward results are avoided by simply applying the Hobbs Act as written, to require an "obtaining of property."

ARGUMENT

I. THE CREATION OF AN IMPLIED PRIVATE EQUITABLE ACTION UNDER CIVIL RICO VIOLATES THIS COURT'S "PARTICULAR UNDERSTANDING OF THE GENESIS OF PRIVATE CAUSES OF ACTION."

As petitioners have pointed out, the creation in this case of an implied private right of action to obtain injunctive relief under the civil remedies provision of the Racketeer Influenced and Corrupt Organizations Act ("civil RICO"), 18 U.S.C. § 1964 (2000), creates a split in the circuits and contravenes the holding or dicta of nearly every decision to address the subject. Pet. in No. 01-1118 at 6–10; Pet. in No. 01-1119 at 10–12 & nn. 17 & 18. Petitioners also correctly summarize the inconsistency between the holding of the Seventh Circuit and the precedent of this Court, and the lack of support for the holding below in the text and history of RICO. Pet. in No. 01-1118 at 11–14; Pet. in No. 01-1119 at 12–19.

The holding of the Seventh Circuit also violates the basic understanding of implied causes of action expressed last term in *Alexander* v. *Sandoval*, 532 U.S. 275 (2001). In that decision, the Court observed:

> Implicit in our discussion thus far has been a particular understanding of the genesis of private causes of action. Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter

> how desirable that might be as a policy matter, or how compatible with the statute. "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."

Alexander v. *Sandoval*, 532 U.S. at 286–87 (citations omitted) (quoting *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 365 (1991) (SCALIA, J., concurring in part and concurring in judgment)). While the court below cited *Sandoval*, Pet. App. in No. 01-1119 at 8a, its analysis is inconsistent with the "particular understanding of the genesis of private causes of action" expressed in that decision.

The civil remedies provision of RICO, 18 U.S.C. § 1964, provides, in pertinent part, as follows:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) *The Attorney General may institute proceedings under this section.* Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or

> take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) *Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains* and the cost of the suit, including a reasonable attorney's fee . . . .

18 U.S.C. § 1964(a)–(c) (emphasis added).

The statute specifically provides that only the Attorney General "may institute proceedings under" § 1964. 18 U.S.C. § 1964(b). Unlike the Attorney General, private persons are not authorized to "institute proceedings under" § 1964 generally. Instead, private persons have the far more limited ability to sue for business or property injuries sustained "by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Recovery by private plaintiffs is limited to treble damages, costs, and attorney's fees, *id.*; nowhere does § 1964(c) authorize private persons to sue for injunctive relief under § 1964(a). As this Court noted in *Sandoval*, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." 532 U.S. at 290. This is especially the case when the other method of enforcement (i.e., by the Attorney General) is specified in the immediately preceding subsection.

Given the plain text of the statute and the marked difference between the broad authority granted the Attorney General to sue under § 1964 and the limited authority granted private parties to sue only for damages, the Seventh Circuit's "parity of reasoning" approach, Pet. App. in No. 01-1119 at 10a, was inappropriate. That approach renders the differences between the statutory

language in § 1964(b) and § 1964(c) meaningless. It effectively amends § 1964(c) to state that a person injured by a violation of § 1962 "shall recover [, *in addition to any relief authorized in subsection (a) to which he is entitled,*] threefold the damages he sustains and the costs of the suit, including a reasonable attorney's fee." Congress had (and has) the ability to write the statute that way, of course, but has repeatedly chosen not to do so. See Pet. in No. 01-1119 at 16–19 & n.22 (recounting history of attempts to amend RICO to authorize private injunctive actions). The federal courts should not, therefore, create that result "no matter how desirable that might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 287.

In the context of this case, moreover, the addition of private injunctive remedies to the already powerful treble damages available to private persons is hardly desirable as a policy matter. The application of civil RICO to political or social protest activities has a substantially chilling effect on protected First Amendment activity. Adding injunctive remedies to the powerful treble damages available under civil RICO would only lower the temperature further.

II. THE EXPANSION OF THE HOBBS ACT TO PROHIBIT CONDUCT THAT DOES NOT INVOLVE "THE OBTAINING OF PROPERTY" RAISES THE SPECTER OF UNNECESSARY CIVIL RICO LITIGATION AGAINST STATE OFFICIALS.

A second, particularly troubling feature of the Seventh Circuit's decision is its interpretation of the "obtaining of property" element in the definition of extortion under the Hobbs Act, 18 U.S.C. § 1951 (2000). The Hobbs Act

defines "extortion" to mean "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). An act indictable under the Hobbs Act, in turn, is a predicate act under RICO. 18 U.S.C. § 1961(1)(B) (2000).

The court of appeals noted that the Seventh Circuit "has repeatedly held that intangible property such as the right to conduct a business can be considered 'property' under the Hobbs Act," and chose not to revisit that holding. Pet. App. in No. 01-1119 at 36a (citation omitted) (citing *United States* v. *Anderson*, 716 F.2d 446, 450 (7th Cir. 1983)). The court then rejected the defendants' argument "that, even if 'property' was involved, the defendants did not 'obtain' that property; they merely forced the plaintiffs to part with it." *Id.* The court of appeals observed that according to Seventh Circuit precedent, " 'as a legal matter, and extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required.' " *Id.* (quoting *United States* v. *Stillo*, 57 F.3d 553, 559 (7th Cir. 1995)).

The difficulty with the Seventh Circuit's interpretation is not one of applying the Hobbs Act to intangible property. Pet. App. in No. 01-1119 at 36a (citing *Anderson*, 716 F.2d at 450); *see United States* v. *Arena*, 180 F.3d 380, 392 (2d Cir. 1999) (Hobbs Act concept of property "is not limited to tangible things, but includes intangible assets such as rights to solicit customers and to conduct a lawful business"); *Libertad* v. *Welch*, 53 F.3d 428, 438 n.6 (1st Cir. 1995); *United States* v. *Stephens*, 964 F.2d 424, 433 n.20 (5th Cir. 1992); *United States* v. *Debs*, 949 F.2d 199, 201 (6th Cir. 1991); *Northeast Women's Ctr., Inc.* v. *McMonagle*, 868 F.2d

1342, 1350 (3d Cir. 1989) ("[O]ther circuits which have considered this question are unanimous in extending the Hobbs Act to protect intangible, as well as tangible, property."); *United States* v. *Hoelker*, 765 F.2d 1422, 1425 (9th Cir. 1985); *United States* v. *Santoni*, 585 F.2d 667, 673 (4th Cir. 1978); *United States* v. *Nadaline*, 471 F.2d 340, 344 (5th Cir. 1973) (binding precedent in both Fifth and Eleventh Circuits); *see also Carpenter* v. *United States*, 484 U.S. 19, 25–27 (1987) (applying mail fraud statute to intangible property).

The primary flaw in the Seventh Circuit's interpretation is that, under the Hobbs Act definition of extortion, someone must *obtain* (or attempt or conspire to obtain)[1] the victim's property—whether tangible or intangible. As Petitioner points out, the Ninth Circuit has held that this "obtaining" element is critical to finding a violation of the Hobbs Act:

> The four conspirators sought not only to put Blitzstein [the victim] out of business, but actually to get his business interests for themselves. That is important with regard to the "obtaining" element of the Hobbs Act. Of course, "it is not necessary to prove that the extortioner himself, directly or indirectly, received the fruits of his extortion or any benefit therefrom. The Hobbs Act does not require such proof." But under the Hobbs Act, extortion, which is a larceny-type offense, does not occur when a victim is merely forced to part with property. Rather, there must be an "obtaining": someone—either the extortioner or a

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[1] *See* 18 U.S.C. § 1951(a) ("or attempts or conspires so to do"). As used hereinafter, references to "obtaining" include attempting to obtain or conspiring to obtain.

> third person—must receive the property of which the victim is deprived.

United States v. *Panaro*, 266 F.3d 939, 948 (9th Cir. 2001) (citations omitted) (quoting *United States* v. *Provenzano*, 334 F.2d 678, 686 (3d Cir.1964)).

By unmooring the definition of property under the Hobbs Act from the "obtaining" element of the offense, the Seventh Circuit substantially broadened the Hobbs Act, and thus civil RICO. As Petitioner asserts, this interpretation "creates considerable mischief for government actors." Pet. in No. 01-1119 at 20. Perhaps not every act of official misconduct would implicate the kind of intangible economic interests protected by the Hobbs Act and civil RICO. *But see* Steven P. Ragland, Comment, *Using the Master's Tools: Fighting Persistent Police Misconduct with Civil RICO*, 51 Am. U. L. Rev. 139 (2001) (advocating use of civil RICO against police for repeated civil rights violations, based on victims' pecuniary losses); *Guerrero* v. *Gates*, 110 F. Supp. 2d 1287, 1292–93 (C.D. Cal. 2000) (denying motion to dismiss civil RICO action against police officers based on plaintiff's pecuniary losses said to result from alleged police misconduct). Many official actions—such as permitting and regulatory activities—certainly would implicate economic interests, however. Pet. in No. 01-1119 at 21. If "obtaining" tangible or intangible property were not required in order to violate the Hobbs Act, then virtually any State action that affected economic interests could conceivably become the subject of civil RICO litigation. Moreover, if the Hobbs Act applies to interference with *any* rights (even non economic rights) of the victim, as the Seventh Circuit seems to hold, Pet. in No. 01-1119 at 35a–36a (identifying "the class women's rights to seek medical services from the clinics"), the

expansion of the Hobbs Act and civil RICO is truly breathtaking—and troubling.

This is not to suggest that State officials are immune from the Hobbs Act. For example, State officials and other State actors are properly subject to prosecution under the Hobbs Act for accepting bribes. *See, e.g., Evans* v. *United States*, 504 U.S. 255, 268 (1992) (county commissioner). In one unsettling court of appeals decision, the Second Circuit even cited the Hobbs Act in upholding a preliminary injunction prohibiting the attorneys general of 31 States from filing administrative or criminal actions that would affect the rights of any plaintiff or purported class member in ongoing federal multidistrict securities litigation. *In re Baldwin-United Corp. (Single Premium Deferred Annuities Ins. Litig.)*, 770 F.2d 328, 341 (2d Cir. 1985). The court of appeals held that the district court "properly concluded ... that the states would be violating federal law *if* they should bring administrative and criminal proceedings in order to induce the defendants to contribute more toward the settlement being reached in the federal court." *Id.* The court of appeals also held that a State's right to pursue criminal or regulatory actions was protected by sovereign immunity "unless the state action violates the Constitution or federal law, *provided the proceedings are not being used by the state as a means of coercing the defendants into increasing a civil settlement offer to persons who might be represented by the state, see, e.g.*, 42 U.S.C. § 1983 (1982); 18 U.S.C. § 1951 (1982)." *Id.* (emphasis added).

These cases, however, applied traditional principles regarding the "obtaining of [tangible or intangible] property"—either by the State official or by third parties on whose behalf or in whose interest the State official was acting. Removing the "obtaining" element substantially

broadens the Hobbs Act definition of extortion to apply to almost any form of State economic or environmental regulation. This opens the way for civil RICO litigation over a host of governmental decisions that inevitably have economic impact.

Such a result is entirely unnecessary. The Due Process Clause of the Fourteenth Amendment already provides protection from arbitrary or irrational State interference with economic and property interests. U.S. Const. amend. XIV, § 1; *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487–88 (1955). The Due Process Clause also incorporates the Fifth Amendment protection against the taking of private property by States without just compensation. *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 2457 (2001) (citing *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226 (1897)). Allowing civil plaintiffs to litigate State regulation of economic activities under civil RICO would be both burdensome and counterproductive. Insofar as the holding of the Seventh Circuit opens the way for civil RICO litigation involving alleged interference with non-economic rights, the burden would be all the more egregious.

Such untoward results are avoided by the application of the plain meaning of the phrase "obtaining of property" under the Hobbs Act. Requiring property to be *obtained*, as stated in the statute, avoids the unnecessary application of civil RICO to State regulatory activities in which government seeks to regulate, but not to obtain, economic or property interests. It also avoids the serious First Amendment concerns raised by the application of civil RICO to protest activities in which protesters do not obtain the property of others.

CONCLUSION

The petitions for writs of certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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